Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, interveners)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-738 OF 1997
SITI NORMA YAAKOB, DENIS ONG AND HAIDAR JJCA
10 MARCH 2000

Civil Procedure *— Parties — Intervention — Principles applicable — Order pertaining to winding up of company obtained and perfected without knowledge of interveners — Whether breach of natural justice and order is a nullity — Whether High Court functus officio when it granted interveners' application to intervene*

On 19 November 1979, a winding up order was issued whereby Selvam Holdings (M) Sdn Bhd was ordered to be wound up. At that point in time the only entity registered with the Registrar of Companies was the appellant, Selvam Holdings (Malaysia) Sdn Bhd. The appellant filed an originating motion seeking for order that the winding up order was not binding on them. On 24 October 1994, the High Court judge held that both companies were one and the same company and that the winding up order was properly made. There was no appeal against this order. Whilst the originating motion was part heard and pending decision, the appellant filed the originating summons seeking for an answer whether the winding up order was a nullity. On 15 April 1993, another High Court judge allowed the appellant's application by declaring that the winding up order was a nullity, it did not affect the appellant and the appellant had not been wound up ('the 1993 order'). The 1993 order was drawn up and perfected in late April 1993. Subsequently, three interveners applied separately for leave to intervene in the originating summons, be added as defendant to the action and that the 1993 order be set aside. On 7 November 1997, the High Court allowed the interveners' applications, gave them leave to intervene and set aside the 1993 order. The appellant appealed. The issue was whether the High Court was functus officio when it granted the interveners' applications.

Held, dismissing the appeal:

(1) The interveners had established their interests in the outcome of the originating summons and such interests had not been disputed. The fact that they had not been cited as parties in the proceedings and that the 1993 order was obtained without their knowledge had deprived them of their right to be heard on their interests. This was a breach of the rules of natural justice and the 1993 order was a nullity and could be successfully attacked in collateral proceedings ex debito justitiae (see p 209D–E); *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 followed.

(2) The conduct of the appellant was most relevant and most telling. The originating summons was filed whilst the originating motion

was part heard pending decision. Both summonses sought remedies that had the same effect. The appellant's behaviour was highly questionable. Under these circumstances, filing a fresh action to set aside the 1993 order was an exercise in futility as it was counter productive and it would be adding another suit to an already long list of actions relating to the same subject matter (see p 209E–G).

(3) Whilst a court is not bound by a decision of another court exercising concurrent jurisdiction, nonetheless the appellant was placed in the most anomalous position that there were two existing and conflicting orders as to their legal status. Since the appellant had not appealed against both orders, the interveners had provided the alternative whereby the appellant's legal status could be finally resolved. Under these circumstances, the justice of the case entitled the interveners to apply to set aside the 1993 order ex debito justitiae in the same proceedings in which the 1993 order was made and further the High Court was not functious officio to hear and determine such application under its inherent jurisdiction (see pp 209I–210B).

[Bahasa Malaysia summary

Pada 19 November 1979, suatu perintah penggulungan telah dikeluarkan di mana Selvam Holdings (M) Sdn Bhd telah diperintahkan supaya digulung. Pada ketika itu, satu-satunya entiti yang berdaftar dengan Pendaftar Syarikat adalah perayu, Selvam Holdings (Malaysia) Sdn Bhd. Perayu telah memfailkan suatu usul pemula yang memohon untuk mendapatkan perintah bahawa perintah penggulungan tersebut tidak mengikat mereka. Pada 24 Oktober 1994, hakim Mahkamah Tinggi telah memutuskan bahawa kedua-dua syarikat tersebut merupakan satu syarikat yang sama dan bahawa perintah penggulungan tersebut telah dibuat mengikut aturan. Tidak terdapat sebarang rayuan terhadap perintah ini. Sementara usul pemula tersebut didengar sebahagiannya dan menanti keputusan, perayu telah memfailkan saman pemula yang memohon jawapan sama ada perintah penggulungan tersebut merupakan suatu pembatalan. Pada 15 April 1993, seorang hakim Mahkamah Tinggi yang lain telah membenarkan permohonan perayu dengan mengisytiharkan bahawa perintah penggulungan tersebut adalah suatu pembatalan, ia tidak menjejaskan perayu dan perayu telah tidak digulung ('perintah 1993 tersebut'). Perintah 1993 tersebut telah disediakan dan disempurnakan pada hujung bulan April 1993. Kemudiannya, tiga pencelah telah memohon secara berasingan untuk mendapatkan kebenaran untuk mencelah dalam saman pemula tersebut, supaya ditambahkan sebagai defendan kepada tindakan tersebut dan bahawa perintah 1993 tersebut hendaklah diketepikan. Pada 7 November 1997, Mahkamah Tinggi telah membenarkan permohonan-permohonan pencelah-pencelah

A tersebut, memberikan mereka kebenaran untuk mencelah dan mengetepikan perintah 1993 tersebut. Perayu telah merayu. Isunya adalah sama ada Mahkamah Tinggi merupakan functus officio ketika ia membenarkan permohonan-permohonan pencelah-pencelah tersebut.

B

Diputuskan, menolak rayuan tersebut:

(1) Pencelah-pencelah tersebut telah menetapkan kepentingan mereka di dalam keputusan saman pemula tersebut dan kepentingan yang sedemikian telah tidak dipertikaikan. Hakikat
C bahawa mereka telah tidak disebut sebagai pihak-pihak di dalam prosiding itu dan bahawa perintah 1993 tersebut telah diperolehi tanpa pengetahuan mereka, telah melucuthak mereka daripada hak untuk didengar atas kepentingan mereka. Ini adalah keingkaran kaedah-kaedah keadilan asasi dan perintah 1993
D tersebut merupakan suatu pembatalan dan boleh dicabar dengan jayanya dalam prosiding kolateral ex debito justitiae (lihat ms 209D–E); *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 diikut.

(2) Kelakuan perayu amat relevan dan berpengaruh. Saman pemula
E tersebut telah difailkan ketika usul pemula telah didengar sebahagiannya sementara menantikan keputusan. Kedua-dua saman memohon remedi-remedi yang mempunyai kesan yang sama. Kelakuan perayu akan dipersoalkan. Di bawah keadaan-keadaan ini, memfailkan satu tindakan yang baru untuk mengetepikan perintah 1993 adalah suatu perbuatan sia-sia
F sahaja kerana ia semata-mata mempelawa tindakan balas dan akan menambah satu lagi guaman kepada satu senarai tindakan yang panjang berhubung dengan tindakan yang sama (lihat ms 209E–G).

(3) Sementara sesebuah mahkamah tidak terikat oleh keputusan
G sebuah mahkamah lain yang melaksanakan budi bicara serentak, namun begitu, perayu terletak dalam kedudukan yang amat janggal bahawa terdapatnya dua perintah yang wujud dan bercanggahan berhubung dengan kedudukan sah mereka. Oleh kerana perayu telah tidak merayu terhadap kedua-dua perintah,
H pencelah-pencelah tersebut telah memberikan alternatif di mana kedudukan sah perayu bolehlah secara muktamadnya diselesaikan. Di bawah keadaan-keadaan ini, keadilan kes tersebut memberi hak kepada pencelah-pencelah untuk memohon bagi mengetepikan perintah 1993 tersebut ex debito justitiae dalam prosiding yang sama dalam mana perintah 1993 telah dibuat dan
I selanjutnya Mahkamah Tinggi tidak functus officio untuk mendengar dan menentukan permohonan yang sedemikian di bawah bidang kuasa sedia adanya (lihat ms 209I–210B).]

Notes

For cases on intervention generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3278–3295.

Cases referred to

Arab Malaysia Finance Bhd v Badiaddin bin Mohd Mahidin & Anor [1996] 3 MLJ 621 (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

Craig v Kanseen [1943] 1 All ER 108 (refd)

Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37 (folld)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)

Selvam Holdings (M) Sdn Bhd v Toby Lam as the Receiver and Manager and liquidator of Selvam Holdings (M) Sdn Bhd & Anor [1994] 4 CLJ 899 (refd)

Legislation referred to

Companies Act 1965 s 218

Contracts Act 1950 s 66

Malay Reservations Enactment (FMS Cap 142) ss 8, 13, Second Schedule

Rules of the High Court 1980 O 20 r 11

Appeal from: Originating Summons No D1–24–56 of 1993 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (*K Periasamy* and *M Pala* with him) (*Periasamy & Co*) for the appellant.

Malik Imtiaz Sarwar mentioning on behalf of *Bala Kumar* (*Azim Ong & Krishnan*) for the respondent.

Siti Norma Yaakob JCA (delivering judgment of the court): This appeal has a chequered and troubled history. It started off, in relation to the instant appeal, with the appellant filing an originating summons against the respondent on 30 March 1993, seeking replies to three questions that they had posed to the High Court. The three questions relate to an order of court dated 19 November 1979, ('the winding-up order') wherein on the petition of the respondent, a judgment creditor, in Companies Winding-Up No 34 of 1979, Selvam Holdings (M) Sdn Bhd ('the company') was ordered to be wound up and the official receiver appointed the provisional liquidator of the company. At that point in time, the only entity registered with the Registrar of Companies was the appellant, Selvam Holdings (Malaysia) Sdn Bhd. There was no entity known as Selvam Holdings (M) Sdn Bhd, the company that was ordered to be wound-up. From our reading and understanding of the petition itself, it is very clear that the respondent intended to wind-up the appellant but a non-existent entity that used the abbreviation (M) as part of its name was wound-up instead.

A To correct the misapprehension that the appellant and the company were one and the same, the appellant filed Originating Motion No D6–25–42–92 on 26 August 1992, against the Receiver and Manager as well as the liquidator of the company and the Registrar of Companies as respondents, seeking various orders, the principal one being that the winding-up order was not binding or effective on them. On 24 October 1994, Abdul Aziz B Mohamad J, held that Selvam Holdings (Malaysia) Sdn Bhd and Selvam Holdings (M) Sdn Bhd were one and the same company and that the winding-up order was properly made and the Receiver and Manager and Liquidator were properly appointed. There was no appeal against this order and the judgment of the learned judge appears as *Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam as the Receiver and Manager and liquidator* C *of Selvam Holdings (M) Sdn Bhd & Anor* [1994] 4 CLJ 899.

Whilst the aforesaid originating motion was part heard and pending decision, the appellant filed the originating summons from which the instant appeal originate, thirteen years after the winding-up order, seeking answers to three questions, which we consider to be identical to that raised D in the originating motion. Those three questions are as follows:

(1) Whether the winding up order is a nullity.

(2) If question (1) is answered in the negative whether the winding-up order binds the appellant.

E (3) Even if the winding up order is not a nullity that it does not bind or affect the status of the appellant and that the appellant has not been wound-up.

Shaik Daud Ismail J (as he then was) heard the originating summons two weeks after it was filed, and on 15 April 1993, allowed the appellant's application by declaring that the winding-up order was a nullity, it did not F affect the appellant and that the appellant had not been wound-up ('the 1993 order').

The 1993 order was drawn up and perfected in late April 1993, and it was after this date that the three interveners before us applied separately for leave to intervene in the originating summons, be added as defendants to G the action and that the 1993 order be set aside. The second intervener, Esso Production Malaysia, Inc filed their application to intervene first on 18 May 1993, followed by the third intervener, Pemegang Amanah Sekolah Rendah Cina Yu Hwa on 6 September 1993, and lastly by the first intervener, BSN Commercial Bank Malaysia Bhd on 17 July 1995. On 7 November 1997, the High Court allowed the interveners' applications, gave them leave to H intervene and set aside the 1993 order. It was to appeal against this order that the parties were before us.

For completeness, we consider that it is appropriate at this stage to state the interests of the three interveners and the reasons why they wish to be added as parties to the originating summons.

I The first intervener formerly known as Bank Buruh (M) Bhd are both secured and unsecured creditors. As secured creditors, they had, in May 1977, provided a guarantee to Arab Development Malaysian Bank Bhd

('AMDB') in respect of a loan granted by AMDB to the appellant. As consideration for the guarantee, the appellant charged a number of properties to the first intervener. Additionally the first intervener had been appointed a member of the Committee of Inspection after the winding-up order was made as the appellant's assets were insufficient to pay the debt due to the first intervener. Despite being secured creditors, the first intervener had not been served with any papers in the proceedings leading to the issue of the 1993 order.

As for the second intervener, they fear that the appellant may use the 1993 order to issue a notice under s 218 of the Companies Act 1965, to demand a sum of money allegedly due from the second intervener for arrears of rental in respect of the appellant's premises known as No 9, Lorong Lee Hin Neo, Ukay Heights, Ampang. The second intervener contend that all rentals due to the appellant had been paid to the court appointed liquidator by virtue of the winding-up order.

We consider that the second intervener's fear that a threatened winding-up proceeding may well be on the appellant's agenda, is not without basis as they had been served with a similar notice in August 1992 in respect of the same alleged debt and as a result of which, they instituted proceedings in Originating Summons No D4–22–1244–92 against the appellant seeking various declarations relating to the legal status of the appellant.

Lastly we have the third intervener who had been sued by the appellant in Shah Alam in Civil Suit No 22–417–92 praying for a retransfer of a property which had been sold by the Receiver and Manager of the appellant to Yu Hwa Chinese Primary School, Kajang, pursuant to a debenture and charge executed by the company in favour of the first intervener. The appellant allege that the sale and transfer of the property by the Receiver and Manager to the third intervener was made without the authority of the appellant and that the company did not have the authority to charge the land to the first intervener. The interest claimed by the third intervener is that the prayers claimed in the Shah Alam civil suit is connected to the 1993 order.

Before us, the parties raised one issue, that being a jurisdictional one and it relates to whether the High Court was functus officio when it granted the interveners' applications. This issue, we were told, was never canvassed or argued before the High Court but the parties appear to be agreeable to have it determined for the first time before us.

The appellant concede that the interveners may well have the right to intervene and set aside the 1993 order but they contend that the procedure for doing so is not by way of an application in the same suit before the High Court but by filing a fresh action to have the 1993 order set aside. This is so as the 1993 order had already been drawn up and perfected and relying on the decisions made by the Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 and the more recent case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, they further contend that the High Court should have struck out the

A interveners' applications and directed them to file a fresh action. Likewise the interveners rely on the same case law to say that the orders to intervene had been correctly made in the same suit in which the order sought to be impeached had been entered.

The principles of law as enunciated by the Federal Court in *Hock Hua*
B *Bank*'s case can be stated in the following manner.

Once an order of court has been drawn up and perfected and it becomes a final order, it cannot be altered, varied or set aside in the same action as the court has become functus officio and the court has no jurisdiction to entertain any application to alter, vary or set aside the final order. However like any other general principle, there are exceptions to it and in the
C following cases, the same court has the inherent power to entertain any application to amend or set aside a final order.

(1) Under O 20 r 11 of the Rules of the High Court 1980, better known as the slip rule, insofar as it is necessary to correct errors in expressing the intention of the court.

D (2) The order relates to a judgment in default or made in the absence of a party at the trial or hearing.

Then in 1982, following *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37, another category of cases was added to the aforesaid list. These cases refer to orders that have been obtained in breach of the rules of natural justice as
E such orders are nullities and they can be successfully attacked in collateral proceedings ex debito justitiae.

Despite the above restrictions, an aggrieved party can still impeach a regularly drawn up order but only in a fresh suit brought to attack the order on the grounds that such an order had been obtained by fraud or that fresh
F evidence, not available at the trial or hearing, had since surfaced that may affect the order. To this we like to add another situation where a regularly obtained order can be questioned ie where the order had been entered by consent. Under those circumstances the aggrieved party may institute fresh proceedings to attack the consent order.

G In all the instances that we have cited, the normal appeal procedure is dispensed with. See also *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 and *Craig v Kanseen* [1943] 1 All ER 108.

That was the situation until 1998 when *Badiaddin*'s, case, came to be decided. *Badiaddin*'s case, we say, extended the scope and extent of the
H inherent and discretionary jurisdiction of a court with unlimited jurisdiction to set aside an earlier order in the following two circumstances:

(1) where the earlier order had contravened a substantive statutory prohibition so as to render the earlier order defective on the ground of illegality or lack of jurisdiction; and

I (2) where in exceptional cases, the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside.

Under the aforesaid circumstances, a court is seized with the necessary jurisdiction to entertain an application to set aside the earlier order ex debito justitiae. Expressed in another way there is no need to adopt the appeal procedure nor to file a fresh suit to set aside the defective order. That can be done in the same proceedings where the impeached order was granted and before the same judge or another judge with concurrent jurisdiction.

The facts of *Badiaddin*'s case were that the appellants were co-owners of a Malay holding under the Malay Reservations Enactment (FMS Cap 142) ('the Enactment') (As applicable to the State of Negeri Sembilan). Such landed property suffers restrictions in their dealings in that

(1) no charge can be created over it in favour of a non-Malay under s 8 of the Enactment; and

(2) under s 13 of the Enactment, it cannot be attached in execution of a decree or order unless the order or decree was obtained in proceedings instituted before the commencement of the Enactment.

The appellants charged the land to the respondent as security for a loan granted by the respondent to one Ismail bin Omar, a business associate of the appellants. Ismail failed to service the loan and the respondent foreclosed the land and obtained an order to sell it from the Land Administrator.

As the third party charge had contravened s 8 of the Enactment and at the material time the respondent were never specified a 'Malay' under the Second Schedule to the Enactment, the appellants, as chargors, applied and obtained a declaration on 21 March 1988, that the charge and the order of sale made by the Land Administrator were null and void (the first order). The respondent did not appeal against this order.

Two years later, the respondent who, by then, had become unsecured creditors applied to invoke s 66 of the Contracts Act 1950, before the same judge and they obtained an order on 8 October 1990 (the second order) to the effect that since the appellants had received an advantage or benefit from the respondent under the void loan agreement, they, the appellants were ordered to compensate the respondent and in order to do so, the land was also ordered to be sold by public auction or private treaty and the proceeds be utilised to settle the balance of the outstanding loan made to Ismail.

This forced the appellants to file an application in the same proceedings to have the second order set aside and this was allowed by Mohd Noor Abdullah, J on 22 September 1995 (the third order). The matter did not end there but proceeded to this court which allowed the respondent's appeal on the ground that the High Court was functus officio as Mohd Noor Abduliah, J had no jurisdiction to set aside the second order. See the judgment of this court in *Arab Malaysia Finance Bhd v Badiaddin bin Mohd Mahidin & Anor* [1996] 3 MLJ 621.

The appellants appealed and in allowing the appeal, the Federal Court held that this court had erred when it proceeded to consider the issue of

A functus officio only but declined to enter into the broader spectrum of the case, namely its merit and particularly the applicability of s 66 of the Contracts Act 1950. In so reversing the decision of this court, the Federal Court had confirmed that the High Court in its inherent jurisdiction can set aside its own order ex debito justitiae made in breach of a written law and which it had decided without jurisdiction. 'The ends of justice will not be B met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance. Neither has the functus officio theory, which, upon close examination is merely part and parcel of the doctrine of res judicata, any role to play in the case.

C Additionally, the Federal Court held that the '*discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice*'.

From what we have said so far can the three interveners intervene in the D same proceedings in which the 1993 order was made? We say they can for the following reasons.

Since they have established their interests in the outcome of the originating summons and such interests have not been disputed, the fact that they have not been cited as parties in the proceedings and that the 1993 order was obtained without their knowledge have deprived them of their E right to be heard on their interests. This is a breach of the rules of natural justice and following *Eu Finance Bhd*'s case, the 1993 order is a nullity and can be successfully attacked in collateral proceedings ex debito justitiae.

In this regard, the conduct of the appellant is most relevant and most telling. The originating summons was filed whilst the originating motion F before Abdul Aziz Mohamad J was part heard pending decision. Both summonses seek remedies that have the same effect. The originating summons was heard two weeks after it was filed, thereby stealing a march on the originating motion.

We say that the appellant's behaviour is highly questionable and that of their solicitors most unprofessional. Under these circumstances we consider G that filing a fresh action to set aside the 1993 order is an exercise in futility as it is counter productive and it will be adding another suit to an already long list of actions relating to the same subject matter. One need only read the judgment of the trial judge to appreciate the numerous suits and summonses filed by the appellant following their non-acceptance of the H winding-up order as they contend that they were not the entity affected by the order. But they had not appealed against that order. Instead they filed the originating motion which has since been decided by Abdui Aziz Mohamad J. Again no appeal had been lodged by the appellant in that originating motion. This later judgment runs contrary to the 1993 order and whilst we appreciate that a court is not bound by a decision of another I court exercising concurrent jurisdiction, nonetheless the appellant are now placed in the most anomalous position in that there are two existing and conflicting orders as to their legal status. Since the appellant had not

appealed against both orders, the interveners have provided the alternative whereby the appellant's legal status can be finally resolved. A

Under these circumstances we consider that the justice of the case entities the interveners to apply to set aside the 1993 order ex debito justitae in the same proceedings in which the 1993 order was made and further that the High Court was not functus officio to hear and determine such application under its inherent jurisdiction and we so hold. For the reasons stated we uphold the decision of the High Court and affirm the orders it made on 7 November 1997. Consequently, we dismiss this appeal with costs and order that the deposit be paid out to the interveners to account of their taxed costs. B

In respect of costs, considering that there is a valid winding up order against the appellant, we direct that the costs be borne by JL Selvam personally. C

Appeal dismissed.

Reported by Jafisah Jaafar D

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